

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,)
1030 15th Street NW, B255)
Washington, DC 20005)
)
 Plaintiff,)
)
v.)
)
U.S. DEPARTMENT OF)
HOMELAND SECURITY,)
Office of the General Counsel)
245 Murray Lane SW)
Mailstop: 0485) Case No. _____
Washington, DC 20528,)
)
U.S. IMMIGRATION)
AND CUSTOMS ENFORCEMENT,)
500 12th Street SW)
Washington, DC 20536,)
)
and)
)
U.S. CUSTOMS)
AND BORDER PROTECTION)
1300 Pennsylvania Avenue NW)
Washington, DC 20229)
)
 Defendants.)
)

)

COMPLAINT

1. Plaintiff American Oversight brings this action against the U.S. Department of Homeland Security and its related component agencies, the U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection, under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1).

4. Because Defendants have failed to comply with the applicable time-limit provisions of FOIA, American Oversight is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i), and is now entitled to judicial action enjoining the agencies from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan, non-profit section 501(c)(3) organization primarily engaged in disseminating information to the public. American Oversight is committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information gathered, and its analysis of such information, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant U.S. Department of Homeland Security (“DHS”) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). The DHS Privacy Office

(“DHSHQ”) coordinates FOIA requests for several DHS components. DHS has possession, custody, and control of the records that American Oversight seeks.

7. Defendants U.S. Immigration and Customs Enforcement (“ICE”) and U.S. Customs and Border Protection (“CBP”) are components of DHS headquartered in Washington, DC, and agencies of the federal government within the meaning of 5 U.S.C. § 552(f)(1). ICE and CBP have possession, custody, and control of the records that American Oversight seeks.

STATEMENT OF FACTS

8. On February 8 and April 18, 2019, American Oversight submitted three FOIA requests to ICE and CBP seeking records relating to trainings the agencies provide regarding the treatment of transgender, pregnant, and juvenile detainees, as well as the staffing of the Immigration and Customs Enforcement Health Services Corps (“IHSC”) tasked with caring for at-risk detainees. American Oversight provided search terms and limited its requests to documents post-dating January 20, 2017 for certain requests, and fiscal years 2015-2019 for remaining requests, in order to reduce the volume of responsive records.

Transgender Detainees FOIA

9. On February 8, 2019, American Oversight submitted a FOIA request to ICE and CBP with internal tracking number DHS-19-0195, seeking the following records:

1. Records reflecting all specific training ICE and CBP provide, or have provided, for officers, agents, and contractors regarding the processing of, medical evaluation and care for, and safety measures to be taken for transgender detainees.

Records responsive to this request include, but are not limited to, training materials used to train officers, agents, or contractors on the treatment of transgender detainees, and records documenting the actual provision of such trainings to officers, agents, or contractors. ICE and CBP are in the best position to identify the offices most likely to contain records responsive to this request, but public reporting indicates that relevant trainings were likely held at the Cibola County, New Mexico facility that ICE employs for transgender detainees.

2. Records sufficient to demonstrate all final ICE and CBP policies and directives regarding the processing of, medical evaluation and care for, and safety measures to be taken for transgender detainees.

Please provide all responsive records from January 20, 2017, through the date of the search.

10. On March 6, 2019, ICE acknowledged receipt of the Transgender Detainees FOIA and assigned it reference number 2019-ICFO-29818. ICE determined that portions of the information sought are under CBP's purview, and referred the request to CBP.

11. On March 11, 2019, CBP acknowledged receipt of the Transgender Detainees FOIA and assigned it reference number CBP-2019-027893.

12. American Oversight has not received any further communication from ICE or CBP regarding the Transgender Detainees FOIA.

Pregnant and Juvenile Detainees FOIA

13. On April 18, 2019, American Oversight submitted a FOIA request to ICE and CBP with internal tracking number DHS-19-0494, seeking the following records:

1. Records reflecting all specific training ICE and CBP provide, or have provided, for officers, agents, contractors, and sub-contractors regarding the processing of, medical evaluation and care for, and safety measures to be taken for pregnant detainees.

Records responsive to this request include, but are not limited to, training materials used to train officers, agents, contractors, or sub-contractors on the treatment of pregnant detainees, and records documenting the actual provision of such trainings to officers, agents, contractors, or sub-contractors. American Oversight believes ICE and CBP to be in the best position to identify the offices most likely to contain records responsive to this request.

2. Records sufficient to demonstrate all final ICE and CBP policies and directives regarding the processing of, medical evaluation and care for, and safety measures to be taken for pregnant detainees.
3. Records reflecting all specific training ICE and CBP provide, or have provided, for officers, agents, contractors, and sub-contractors regarding the processing of,

medical evaluation and care for, and safety measures to be taken for juvenile detainees.

Records responsive to this request include, but are not limited to, training materials used to train officers, agents, contractors, or sub-contractors on the treatment of juvenile detainees, and records documenting the actual provision of such trainings to officers, agents, contractors, or sub-contractors. American Oversight believes ICE and CBP to be in the best position to identify the offices most likely to contain records responsive to this request.

4. Records sufficient to demonstrate all final ICE and CBP policies and directives regarding the processing of, medical evaluation and care for, and safety measures to be taken for juvenile detainees.
5. Records reflecting all specific training ICE and CBP provide, or have provided, for officers, agents, contractors, and sub-contractors regarding the processing of, medical evaluation and care for, and safety measures to be taken for detainees who have miscarried.

Records responsive to this request include, but are not limited to, training materials used to train officers, agents, contractors, or sub-contractors on the treatment of detainees who have miscarried, and records documenting the actual provision of such trainings to officers, agents, contractors, or sub-contractors. American Oversight believes ICE and CBP to be in the best position to identify the offices most likely to contain records responsive to this request.

6. Records sufficient to demonstrate all final ICE and CBP policies and directives regarding the processing of, medical evaluation and care for, and safety measures to be taken for detainees who have miscarried.
7. All email communications (including emails, email attachments, and calendar invitations) of (1) Matthew Albence, now- Acting Director of ICE, and anyone who has served as his chief of staff, (2) former Acting ICE Director Thomas Homan and anyone who served as his chief of staff, (3) former ICE Acting Director Ronald D. Vitello and anyone who served as his chief of staff, and (4) former CBP Commissioner Kevin McAleenan and anyone who served as his chief of staff, containing any of the following key terms:
 - a. Stillborn
 - b. Stillbirth
 - c. “Still born”
 - d. Restraine*
 - e. Shackl*
 - f. “Pregnancy failure”
 - g. “Unsuccessful pregnancy”
 - h. “Premature labor”

- i. "Pre-mature labor"
- j. "Unresponsive infant"
- k. "nonresponsive infant"
- l. "High-risk pregnancy"
- m. "High risk pregnancy"
- n. "Post-partum treatment"
- o. "Postpartum treatment"
- p. "Pregn* complicat*"

Please provide all responsive records from January 20, 2017, through the date of the search.

Please note that American Oversight is using the asterisk (*) to designate the standard use of "wildcards" in the search for responsive records. For example, a search for "separat*" would return all of the following: separate, separates, separated, separation, etc. If your agency is unable to search for wildcards, please advise so that we may specifically include the variations that we would like searched.

Please exclude news clips generated from non-governmental services and emails distributed to a wide listserv of twenty or more email addresses. A news clips email that is forwarded by an individual to one of the identified individuals with any additional message *should* be considered responsive.

14. On April 22, 2019, CBP acknowledged receipt of the Pregnant and Juvenile Detainees FOIA and assigned it reference number CBP-2019-045703.

15. On May 2, 2019, ICE acknowledged receipt of the Pregnant and Juvenile Detainees FOIA and assigned it reference number 2019-ICFO-36401.

16. American Oversight has not received any further communication from CBP or ICE regarding the Pregnant and Juvenile Detainees FOIA.

IHSC Staffing FOIA

17. On April 18, 2019, American Oversight submitted a FOIA request to ICE with internal tracking number DHS-ICE-19-0495, seeking the following records:

1. Records sufficient to show current staffing levels at IHSC, including but not limited to:
 - The number of people hired in fiscal years ("FYs") 2015-2016, 2016-2017, 2017-2018, and 2018-2019.

- The number of people who have been terminated from or vacated their staff positions in IHSC for FYs 2015-2016, 2016-2017, 2017-2018, and 2018-2019.
- Total full-time equivalents (FTE) for FYs 2015-2016, 2016-2017, 2017-2018, and 2018-2019.

The number of people employed with IHSC in a mental-health-services-capacity in FYs 2015-2016, 2016-2017, 2017-2018, and 2018-2019.

2. Records sufficient to demonstrate the extent of IHSC recruitment efforts, including but not limited to:
 - All final IHSC policies and directives regarding recruitment outreach efforts.
 - All final IHSC policies and directives regarding the recruitment of IHSC personnel.
 - Current or past recruitment incentives, along with the monetary value(s) assigned thereto.

American Oversight does not object to redaction from such records of any names or identifying information of agency personnel.

Please provide all responsive records for FYs 2015-2016, 2016-2017, 2017-2018, and 2018-2019. Please bear in mind that responsive documents related to FYs 2015-2016, 2016-2017, 2017-2018, and 2018-2019 might be dated outside of those fiscal years.

18. On April 30, 2019, ICE acknowledged receipt of the IHSC Staffing FOIA and assigned it reference number 2019-ICFO-36404.

19. American Oversight has not received any further communication from ICE regarding the IHSC Staffing FOIA.

Exhaustion of Administrative Remedies

20. As of the date of this Complaint, Defendants have failed to (a) notify American Oversight of a final determination regarding American Oversight's FOIA requests, including the scope of responsive records Defendants intend to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

21. Through Defendants' failure to respond to American Oversight's FOIA requests within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Searches for Responsive Records

22. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

23. American Oversight properly requested records within the possession, custody, and control of Defendants.

24. Defendants are agencies subject to FOIA, and they must therefore make reasonable efforts to search for requested records.

25. Defendants have failed to promptly review agency records for the purpose of locating those records that are responsive to American Oversight's FOIA requests.

26. Defendants' failure to conduct an adequate search for responsive records violates FOIA and applicable regulations.

27. Plaintiff American Oversight is therefore entitled to injunctive and declaratory relief requiring Defendants to promptly make reasonable efforts to search for records responsive to American Oversight's FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

28. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

29. American Oversight properly requested records within the possession, custody, and control of Defendants.

30. Defendants are agencies subject to FOIA, and they must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

31. Defendants are wrongfully withholding non-exempt agency records requested by American Oversight by failing to produce non-exempt records responsive to its FOIA requests.

32. Defendants are wrongfully withholding non-exempt agency records requested by American Oversight by failing to segregate exempt information in otherwise non-exempt records responsive to American Oversight's FOIA requests.

33. Defendants' failure to provide all non-exempt responsive records violates FOIA and applicable regulations.

34. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Defendants to promptly produce all non-exempt records responsive to its FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendants to conduct a search or searches reasonably calculated to uncover all records responsive to American Oversight's FOIA requests;
- (2) Order Defendants to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive

to American Oversight's FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;

(3) Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to American Oversight's FOIA requests;

(4) Award American Oversight the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and

(5) Grant American Oversight such other relief as the Court deems just and proper.

Dated: June 26, 2019

Respectfully submitted,

/s/ Erica C. Lai

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